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14 *Attorneys for Plaintiffs*

15 **IN THE UNITED STATES DISTRICT COURT**
16 **FOR THE DISTRICT OF MONTANA**
17 **MISSOULA DIVISION**

18 WILL BALLEW, on behalf of himself and) CV-15-133-M-DLC
19 all others similarly situated,)
20 Plaintiff,) **PLAINTIFF'S BRIEF IN SUPPORT OF**
21 vs.) **MOTION FOR CLASS CERTIFICATION**
22 VW Credit, Inc.)
23 Defendant.)
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I. INTRODUCTION

Defendant VW Credit, Inc. is the financing arm of Volkswagen Group of America (VW). On September 18, 2015, the US Environmental Protection Agency sent VW a Notice of Violation that informed VW that the EPA had discovered software algorithms in certain VW diesel cars (the “Violating Vehicles”) that acted as “defeat devices” to circumvent emissions testing. Numerous consumers who have purchased Violating Vehicles financed the purchase through Defendant VW Credit. Plaintiff Ballew filed his Complaint in this matter on behalf of himself and all others similarly situated asking the Court to rescind the purchase agreement for the Violating Vehicles. Plaintiff Ballew now asks the Court in this matter to certify a class of consumers who purchased Violating Vehicles and financed their purchase through VW Credit.

The Violating Vehicles include the following models:

Year	EPA Test Group	Make and Model
2009	9VWXV02.035N	VW Jetta, VW Jetta Sportwagen
2009	9VWXV02.0U5N	VW Jetta, VW Jetta Sportwagen
2010	AVWXV02.0U5N	VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3
2011	BVWXV02.0U5N	VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3
2012	CVWXV02.0U5N	VW Beetle, VW Beetle Convertible, VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3
2012	CVWXV02.0U4S	VW Passat
2013	DVWXV02.0U5N	VW Beetle, VW Beetle Convertible, VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3

2013	DVWXV02.0U4S	VW Passat
2014	EVWXV02.0U5N	VW Beetle, VW Beetle Convertible, VW Golf, VW Jetta, VW Jetta Sportwagen, Audi A3
2014	EVWXV02.0U4S	VW Passat
2015	FVGAV02.0VAL	VW Beetle, VW Beetle Convertible, VW Golf, VW Golf Sportwagen, VW Jetta, VW Passat, Audi A3

By separate motion, Plaintiff Ballew has asked this Court to enjoin all payments by class members to VW Credit, and to enjoin VW Credit from making any derogatory reports about the class to any credit reporting agencies. Pursuant to FRCP 23(c)(1)(A), Plaintiff Ballew now asks the Court to certify a class defined as:

All consumers who purchased a Violating Vehicle in the United States who financed the purchase through VW Credit, Inc.

Plaintiff Ballew proposes two subclasses:

Subclass One: All consumers who purchased a Violating Vehicle in the United States who financed the purchase through VW Credit, Inc. who have paid off the full purchase price of the Violating Vehicle.

Subclass Two: All consumers who purchased a Violating Vehicle in the United States who financed the purchase through VW Credit, Inc. who have not yet paid off the full purchase price of the Violating Vehicle.

Rule 23(c)(1)(A) requires that “[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.” Here, given the nature of the class

1 claim for rescission and the request for injunctive relief, certification of a class is
2 appropriate. Moreover, given VW's public admissions of wrongdoing, an
3 expedited class certification is appropriate.
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5 **II. ARGUMENT**

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7 A plaintiff seeking to certify a class must meet the requirements of FRCP
8 23(a) – generally referred to as numerosity, commonality, typicality, and
9 adequacy, *see Wal-Mart Stores, Inc. v Dukes*, 131 S.Ct. 2541, 2550 (2011) – as well
10 as one of the subsections of FRCP 23(b). The Court must take the substantive
11 allegations of the Complaint as true. *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir.
12 1975). Moreover, the Court must conduct a “rigorous analysis” and “probe behind
13 the pleadings before coming to rest on the certification question.” *Dukes*, 131 S.Ct
14 at 2551. This Court may consider material beyond the pleadings and require
15 supplemental evidence from the parties. *Blackie*, 524 F.2d at 901 n.17. A district
16 court may certify a class at its discretion. *See Abdullah v. U.S. Security Associates,*
17 *Inc.*, 731 F.3d 952, 956 (9th Cir. 2013).
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23 Class treatment is appropriate where, as here, a large group of consumers
24 has been adversely affected by an auto manufacturer's common scheme. *See*
25 *Chamberlan v. Ford*, 223 F.R.D. 524 (N.D.Cal. 2004); *Johnson v. General Mills, Inc.*
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1 276 F.R.D. 519, 521 (C.D.Cal. 2011). Here, the proposed class were all wronged by
2 VW's scheme of installing a defeat device in each of the proposed class member's
3 vehicles. Next, each proposed class member arranged financing through VW's
4 subsidiary, VW Credit. The proposed class will be able to establish liability through
5 proof common to the entire proposed class. Moreover, the proposed class here is
6 easily ascertainable because the proposed class members can be readily identified
7 by VW Credit's contract documents.
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11 Rule 23(a) provides that a case is appropriate for certification as a class
12 action if:
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- 14 (1) the class is so numerous that joinder of all members is impracticable;
15 (2) there are questions of law or fact common to the class;
16 (3) the claims or defenses of the representative parties are typical of the
17 claims or defenses of the class; and
18 (4) the representative parties will fairly and adequately protect the
19 interests of the class.

20 FRCP 23(a). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). As
21 explained below, Plaintiff Ballew meets the Rule 23(a) requirements.
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23 **A. Numerosity**

24 Rule 23(a)(1) requires that the class be "so numerous that joinder of all
25 members is impracticable." Fed. R. Civ. P. 23(a)(1); see also *Hanlon v. Chrysler*
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1 *Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). “Generally speaking, courts will find
2 that the ‘numerosity’ requirement has been satisfied when the class comprises 40
3 or more members, and will find that it has not been satisfied when the class
4 comprises 21 or fewer.” *Ansari v. New York Univ.* (SD NY 1998) 179 F.R.D. 112,
5 114. Here, the numerosity requirement is satisfied because hundreds of
6 thousands of Violating Vehicles were sold in the United States, and many
7 thousands financed the purchase of the Violating vehicles through VW Credit.
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11 **B. Commonality**

12 “The Supreme Court has recently emphasized that commonality requires
13 that the class members’ claims depend upon a common contention such that
14 determination of its truth or falsity will resolve an issue that is central to the
15 validity of each claim in one stroke.” *Abdullah*, 731 F.3d at 957 (internal
16 quotations omitted). Thus the key inquiry is not whether there are common
17 questions, but rather whether class certification will generate common answers
18 to resolve the litigation. *Dukes*, 131 S.Ct. at 2551. “This does not, however, mean
19 that every question of law or fact must be common to the class; all that Rule
20 23(a)(2) requires is a single *significant* question of law or fact.” *Abdullah*, 731 F.3d
21 at 957 (internal quotations omitted)(original emphasis). Rule 23(a)(2) is construed
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1 permissively. *Hanlon v. Chrysler Corp.* 150 F.3d 1011, 1019 (9th Cir. 1998). In short,
2 class members' claims must "depend upon a common contention" such that
3 "determination of its truth or falsity will resolve an issue that is central to the
4 validity of each one of the claims in one stroke." *Dukes*, 131 S. Ct. at 2551.
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6 The questions of law and fact that are common to the proposed class
7 include:
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- 9 1. Whether VW installed defeat devices in the Violating Vehicles;
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- 11 2. Whether the Violating Vehicles meet federal emissions standards;
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- 13 3. Whether VW misled the proposed class members with its advertising
14 and publications;
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- 16 4. Whether VW acted intentionally in making its false claims about the
17 characteristics of the Violating Vehicles;
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- 19 5. Whether VW's misrepresentations about the Violating Vehicles would
20 be misleading to a reasonable consumer;
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- 22 6. Whether VW knew, or by the exercise of reasonable care should have
23 known, that its misrepresentations and misleading and false advertising
24 concerning the Violating Vehicles would mislead a reasonable
25 consumer;
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- 1 7. Whether potential class members reasonably relied on VW's
- 2 misrepresentations when purchasing a Violating Vehicle; and
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- 4 8. Whether potential class members entered into a financing contract with
- 5 VW Credit.
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7 These questions all arise from a common core of facts and law, thus the
8 determination of these common issues will resolve the core issues for all class
9 members. Commonality is satisfied.
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11 **C. Typicality**

12 The typicality requirement of Rule 23(a) is met if “the claims and defenses
13 of the representative parties are typical of the claims or defenses of the class.”
14 FRCP 23(a)(3). “Under the rule’s permissive standards, representative claims are
15 ‘typical’ if they are reasonably co-extensive with those of absent class members;
16 they need not be substantially identical.” *Hanlon*, 150 F.3d at 1020. Typicality,
17 like commonality, is a permissive standard. *Hanlon*, 150 F.3d at 1020. “The test of
18 typicality is whether other members have the same or similar injury, whether the
19 action is based on conduct which is not unique to the named plaintiffs, and
20 whether other class members have been injured by the same course of conduct.”
21 *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). To be typical, a
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1 class representative must show that he is not subject to a defense that is not
2 typical of the defenses raised against other proposed class members. *Hanon*, 976
3 F.2d at 508.
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5 Plaintiff Ballew's claims are typical of the proposed class because his claims
6 and the claims of the proposed class all arise from the same – admitted –
7 wrongful conduct of VW. VW's advertising and marketing for its Violating Vehicles
8 was nationwide, and each of the proposed class members was misled by the same
9 advertising and marketing campaign. Each class member's claim arises from his
10 purchase of a Violating Vehicle and entering into a financing contract with VW
11 Credit.
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15 **D. Adequacy**

16 Rule 23(a)(4) requires the class representative and class counsel to
17 represent the interests of absent class members fairly and adequately. Here
18 Plaintiff Ballew satisfies the adequacy requirement of Rule 23(a). His interests and
19 claims are aligned with the other members of the potential class, and he is willing
20 to prosecute the class claims actively. The claims of Plaintiff Ballew and class
21 members are essentially coextensive and there is no conflict. Plaintiff Ballew has
22 suffered the same harm as the class members.
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Moreover class counsel here satisfy the adequacy requirement of Rule 23(a). Counsel have experience and competency in class action litigation and are pursuing the class claims with zeal.

E. FRCP 23(b)(3) Predominance

Plaintiff Ballew seeks to qualify the class under FRCP 23(b)(3)'s predominance standard. To qualify for certification under Rule 23(b)(3), common questions must "predominate over any questions affecting only individual members," and class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy." FRCP 23(b)(3). Rule 26(b)(3) certification is for cases "in which a class action would achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem*, 521 U.S. at 615 (citations omitted).

This Court must determine if the potential class proposed here is "sufficiently cohesive" to satisfy the predominance requirement. *Amchem*, 521 U.S. at 623. Common issues must "present a significant aspect of the case" that the Court can "resolve[] for all members of the class in a single adjudication." *Hanlon*, 150 F.3d at 1022. "The predominance analysis under Rule 26(b)(3)

1 focuses on the relationship between the common and individual issues in the
2 case, and tests whether the proposed class is sufficiently cohesive to warrant
3 adjudication by representation.” *Abdullah*, 731 F.3d at 964 (quotations omitted).
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5 Here common issues predominate because the evidence to prove Plaintiff’s
6 Ballew’s claims is the same evidence needed to prove all class members’ claims.
7 The evidence to prove the class claims is the same regardless of the number of
8 individuals in the class. The evidence will include VW’s defeat device; VW’s
9 scheme to implement the defeat device; the results of EPA’s testing of the
10 Violating Vehicles; VW’s admissions of wrongdoing; VW’s advertising and
11 marketing campaign materials; and VW Credit’s contracts with class members.
12 VW has essentially admitted commonality by stating that the defeat device is in
13 the Violating Vehicles and that it will implement a fix to the defeat device for all
14 Violating Vehicles.
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20 **F. Superiority**

21 This Court must also determine if proceeding as a class is the superior
22 method of prosecuting the case in controversy. FRCP 23(b)(3). To determine
23 superiority, the Court considers the following non-exclusive factors: A) the class
24 members’ interest in individually controlling separate actions; B) extent and
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1 nature of other litigation already begun; C) desirability of concentrating claims in
2 the current forum; and D) likely difficulties of managing a class action. FRCP
3 23(b)(3); *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 539 (2012). “In deciding
4 whether class certification will achieve substantial efficiencies, the proper
5 comparison is not between class litigation and no litigation at all, but between
6 class litigation and actions conducted separately by individual class members.”
7 *Ellis*, 285 F.R.D. at 539 (quoting *United States v. City of New York*, 276 F.R.D. 22,
8 49). “[T]he purpose of the superiority requirement is to assure that the class
9 action is the most efficient and effective means of resolving the controversy.”
10 *Wolin v. Jaguar Land Rover N. Am.*, LLC, 617 F.3d 1168, 1175 (9th Cir. 2010).

11 Here, all aspects of the superiority requirements are met. The factual,
12 legal, and financial burdens of individual litigants are too high to motivate many
13 class members from litigating their claims on an individual basis. The complex
14 technical issues regarding the defeat device algorithm and VW’s implementation
15 of the defeat device, together with the costs of prosecuting a case against an
16 entity that, for all practical purposes, is located overseas, as well as the costs of
17 experts, essentially preclude almost all class members from pursuing their claim
18 on an individual basis. Certification of a class would conserve judicial and
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1 individual resources.

2 To date, counsel for Plaintiff Ballew are not aware of any claims made
3 against VW Credit similar to the claims in this lawsuit. Claims against VW, are
4 many, however, and will likely be consolidated in a MDL.
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6 The final superiority factor regarding manageability emphasizes the issue
7 of whether “the complexities of class action treatment outweigh the benefits of
8 considering common issues in one trial” *McKenzie v. Fed. Exp. Corp.*, 275 F.R.D.
9 290, 302 (C.D. Cal. 2011). Here the class approach to manageability is superior to
10 having individuals pursue their claims separately. Any manageability difficulties
11 pale in comparison to the difficulties of managing tens of thousands of individual
12 claims.
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17 **G. Bishop & Heenan and Bechtold Law Firm**

18 Bishop & Heenan and Bechtold Law Firm should be appointed class counsel.
19 These firms brought Plaintiff Ballew’s claims against VW Credit, which was the
20 first such claim against VW Credit filed in the United States. Counsel for Plaintiff
21 Ballew do not claim to exclude other counsel, and welcome the assistance of
22 other counsel. However, the immediacy of class claims in this matter require that
23 the issue of halting payments to VW Credit under the Holder Rule be addressed
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1 with all due expediency.

2 **III. CONCLUSION**

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4 For all the reasons addressed above, Plaintiff Ballew asks the Court to grant
5 his Motion for Class Certification.
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10 DATED this 22nd day of October, 2015.

11 /s/Timothy M. Bechtold
12 BECHTOLD LAW FIRM, PLLC

13
14 John Heenan
15 BISHOP & HEENAN LAW FIRM

16 ATTORNEYS FOR PLAINTIFFS
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18 **CERTIFICATE OF COMPLIANCE**

19 I certify that the foregoing brief in support of a motion is 2437 words, excluding
20 the caption, signature blocks, and certificate of compliance.
21

22 /s/Timothy M. Bechtold
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